United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,285

725

Arthur M. Roy, Appellant,

v.

United States of America, Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JERROLD SCOUTT, JR.
412 Cafritz Building
Washington 6, D. C.

Attorney for Appellant
(Appointed by this Court)

March 6, 1964

STATEMENT OF QUESTIONS PRESENTED

1. Whether a sufficient showing of entrapment was made to require the submission of this issue to the jury?

2. Whether a delay of 13 months between the offense and trial deprived appellant of constitutional guarantees of due process and/or a speedy trial?

3. Whether, because of the aforesaid delay, the testimony of a single narcotic agent satisfies the quantitative requirements of proof?

4. Whether the Harrison Narcotics Act may properly operate as a revenue measure as to contraband narcotics?

5. Whether the purchase of the revenue stamps and acquisition of the order forms as required by the Harrison Narcotics Act requires unconstitutional self-incrimination?

6. Whether the appellant was improperly sentenced as a second offender since his earlier sentence for a narcotics violation was pursuant to the Youth Correction Act instead of the Federal Narcotics Laws?

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

---

* Cases or authorities chiefly relied upon are marked by asterisks.

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,285

Arthur M. Roy, Appellant,

v.

United States of America, Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

ARTHUR M. ROY was indicted on three counts on January 14, 1962. Count I charged a violation of Section 4705(a) of the Harrison Narcotics Act, 26 U.S.C. 4705(a); Count II charged a violation of Section 4704(a) of the same Act; and Count III charged a violation of Section 174 of the Narcotic Drugs Import and Export Act, 21 U.S.C. Section 174. The Appellant pleaded not guilty to all counts, was tried in the

District Court for the District of Columbia, convicted on all three counts, and sentenced to imprisonment for ten years on each count, said sentences to run concurrently. The Appellant filed a petition for leave to appeal without pre-payment of costs, and this petition was granted by the United States District Court on December 4, 1963. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE

The indictment of January 14, 1963, alleged that Roy, on August 23, 1962, in the District of Columbia, had (1) sold a narcotic drug without a written order as required by the Harrison Narcotics Act, 26 U.S.C. Sec. 4705(a); (2) sold a narcotic drug which was not in the original stamped package as required by 26 U.S.C. Sec. 4704(a) of said Act; and (3) facilitated the concealment of an illegally imported narcotic drug, contrary to the Narcotic Drugs Import and Export Act, 21 U.S.C. Sec. 174. These three charges arise out of one alleged sale of heroin by the defendant (and another person who was found mentally incompetent to stand trial) to an undercover policeman on August 23, 1962.

The defendant's plea of Not Guilty was entered on March 1, 1963. Thereafter, on May 3, 1963, he was committed to Saint Elizabeths Hospital for psychiatric examination. On July 30, 1963, the Hospital reported its findings: that

Roy was addicted to narcotics and the criminal acts with which he is charged, if committed by him, were causally related to his addiction; that he was, however, mentally competent to stand trial; and that he did not have a mental disease or defect at the time of the alleged criminal acts.

The defendant was tried on October 1-3, 1963 - more than thirteen months after the alleged offense - found guilty on all three counts, and on November 15, 1963, sentenced to imprisonment for ten years on each count, with the sentences to run concurrently. This appeal was thereafter authorized on December 4, 1963.

The Government's proof of the alleged illegal sale consisted of uncorroborated testimony of Robert I. Bush, an undercover officer of the Narcotics Squad. Officer Bush conducted his "investigation" between March 18, 1962, and December 5, 1962 (Tr. 36), at which time he applied for 51 warrants (Tr. 133) - one of which involved the present defendant. The record shows that Officer Bush familiarized himself with areas frequented by narcotic peddlers and addicts (Tr. 33), became acquainted with and won the confidence of such persons (Tr. 34), for the purpose of making them believe he was in the market for narcotics (Tr. 111), which were to be purchased with funds supplied by the Metropolitan Police Department (Tr. 150). To do this, Officer Bush dressed like an addict (Tr. 35), used the jargon of addicts and hustlers (Tr. 35), associated with known drug users (Tr.

64), and made use of informers (Tr. 93). The Officer had known the defendant for approximately 1-1/2 months prior to the transaction on which this case is predicated (Tr. 40, 44).

The evidence shows that on August 23, 1962, at 3:45 P.M. at the corner of 8th and H Streets, N.E., the defendant Roy asked Officer Bush "if he was looking" to purchase narcotics (Tr. 21). On direct examination the Officer testified he told the defendant he would "see him later" (Tr. 21); on cross-examination he testified he signalled the special employee whereupon the defendant said "never mind" and walked away (Tr. 107). Thereafter, at 6:30 P.M. Bush saw the defendant (in the company of two other persons) in the 700 block of 8th Street, N.E. and followed them into a nearby alley (Tr. 22). The Officer was unable to recall many of the circumstances of the subsequent transaction, such as how the defendant was dressed (Tr. 116), which person initiated the conversation (Tr. 116-117). The Officer testified that he told the defendant that he wanted "five" (Tr. 24, 119); that he gave $7.50 to the defendant's companion, a George Edward Toney (Tr. 25) and received from the defendant five capsules containing 210 milligrams of a white powder (Tr. 25) which, in part, contained heroin hydrochloride (Tr. 174), which is derived from morphine, which in turn is a derivative of opium (Tr. 177). The Government chemist was unable to identify the source of

heroin in this case: whether it had been illegally imported, or was derived from either legally imported morphine or locally produced opium (Tr. 178). The Officer did not give the defendant a written order when he received the capsules; nor were the capsules in a stamped package (Tr. 26).

The defense was based primarily on a plea of insanity, and a challenge to the validity of the statutes under which Roy was both prosecuted and sentenced.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or if the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Harrison Narcotics Act, 38 Stat. 785 (1914), as amended, 26 U.S.C. Sec. 4704, provides in pertinent part as follows:

> (a) General requirement. -- It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

The Harrison Narcotics Act, 38 Stat. 785 (1914), as amended, 26 U.S.C. Sec. 4705, provides in pertinent part as follows:

> (a) General requirement. -- It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

The penalty provisions of the Federal Narcotics Laws, 70 Stat. 568 (1956), 26 U.S.C. Sec. 7237c, provides in pertinent part as follows:

> (c) Conviction of second or subsequent offense.--
>
> (1) Prior offenses counted. -- For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he

previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in --

(A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174);

(B) the Act of July 11, 1941 (21 U.S.C., sec. 184a);

(C) section 9 of the Act of December 17, 1914 (38 Stat. 789);

(D) section 1 of the Act of May 26, 1922 (42 Stat. 596);

(E) section 12 of the Marihuana Tax Act of 1937 (50 Stat. 556); or

(F) section 2557(b)(1) or 2596 of the Internal Revenue Code of 1939.

For purposes of determining prior offenses under the preceding sentence, a reference to any subsection, section, or Act providing a penalty for an offense shall be considered as a reference to such subsection, section, or Act as in effect (as originally enacted or as amended, as the case may be) with respect to the offense for which the offender previously has been convicted.

The Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909), as amended, 21 U.S.C. Sec. 174, provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT OF POINTS

1. A sufficient showing of entrapment was made to require the issue to be submitted to the jury.

2. A delay of 13 months between the offense and trial deprived the appellant of constitutional guarantees of due process and/or a speedy trial.

3. Because of the aforesaid delay, the testimony of a single narcotics agent does not satisfy the quantitative requirements of proof.

4. It would have been impossible to purchase the required revenue stamps since heroin is now contraband; the Harrison Narcotics Act cannot possibly be regarded as a revenue measure as to this drug.

5. An attempt to purchase the required stamps or to secure the required order forms would have been self-incriminating since it would have necessarily acknowledged unlawful possession of heroin.

6. The appellant was improperly sentenced as a second offender since his earlier narcotics offense led to a sentence under the Youth Correction Act, instead of the Federal Narcotics Laws.

SUMMARY OF ARGUMENT

1. The appellant contends that the trial court erred in refusing to submit the issue of entrapment to the jury. The facts are not significantly different from those in Johnson v. United States, 317 F. 2d 127 (App. D.C., 1963), where this Court recently held that a denial of a requested instruction on entrapment required a new trial.

2. Although the offense complained of occurred in August, 1962, the appellant was not tried until October, 1963 -- 13 months later. Trial counsel was not appointed until 7 months after the offense. This delay not only made the preparation of the defense difficult, but also blurred the memory of the narcotics agent, on whose testimony alone the conviction was based. The delay either violated constitutional guarantees of due process and/or speedy trial -- as suggested in Nickens v. United States, 323 F. 2d 808 (App. D. C., 1963) -- or it failed to satisfy the quantitative requirements of proof as suggested in Ross v. United States, No. 17,877, Jan. 28, 1964, and in the dissenting opinions in Wilson v. United States, No. 17,895, Feb. 13, 1964.

3. Two of three counts in the indictment are based on the Harrison Narcotics Act, as to which there are now two problems. First, heroin was made contraband in 1956, and it is literally impossible to purchase the required revenue stamps or to secure the required order forms for this drug. As to heroin, therefore, this Act cannot possibly be regarded

as a revenue measure -- and it is on this basis alone that it has a constitutional foundation. Secondly, an attempt to comply with the Act would have revealed the unlawful possession of heroin; in other words, it would require self-incrimination in violation of the Fifth Amendment. The case of Russell v. United States, 306 F. 2d 402 (9th Cir. 1962), reached this conclusion in dealing with an analogous statute, which required the registration of fire-arms.

4. The appellant was improperly sentenced as a second offender under 70 Stat. 568, 26 U.S.C. 7237. A minimum sentence of 2 years is prescribed for a first offense; a minimum of 5 years for a second offense. The statutory test is whether the offender had previously been convicted of a narcotics offense "the penalty for which was provided" in certain enumerated statutes. The appellant was previously convicted of a narcotics offense at the age of 17, but he was sentenced under the Youth Correction Act -- not one of the Federal Narcotics Laws. The trial court interpreted the pertinent language as if it meant "a penalty for which may be provided." The statute should be strictly construed and any ambiguities resolved in favor of the appellant. This issue appears to be a matter of first impression.

ARGUMENT

I. THE QUESTION OF ENTRAPMENT (AT LEAST AS TO THE TWO SALES COUNTS IN THE INDICTMENT) SHOULD HAVE BEEN PRESENTED TO THE JURY; REFUSAL TO DO SO CONSTITUTES REVERSIBLE ERROR.

Although he was requested to do so, the trial judge refused to instruct the jury on the issue of entrapment (Tr. 458-9), even though the evidence shows the following relevant facts:

(1) the questioned sale was made to an undercover agent of the Narcotics Squad (Tr. 24);

(2) the agent spent one and one-half months in winning Appellant's confidence (Tr. 40, 44);

(3) the services of a "special employee" or informer were utilized (Tr. 93);

(4) the Appellant walked away from the agent's first attempt to purchase narcotics from him (Tr. 107);

(5) the agent thereafter sought out the Appellant in an alley and effected the purchase of 5 capsules of heroin (Tr. 24-25), although the agent was unable to recall whether he initiated the conversation which preceded the sale, or even whether there was any conversation (Tr. 121);

(6) the evidence of the sale was based solely on the testimony of the agent more than 13 months after the event, which agent was engaged in an investigation which led to 50 other indictments (Tr. 133). Two other persons (in addition to the agent and the Appellant) were present at the time of the alleged sale, but neither was called as a witness.

There is no claim that these facts constitute entrapment as a matter of law, but rather that there was a sufficient showing to require submitting the issue of entrapment to the jury.

The government's case, which on this point rested solely on the testimony of its undercover agent, was far from satisfactory. On direct examination the officer neglected to testify that Roy had walked away when he first attempted to purchase narcotics from him (Tr. 21), and when he followed the Appellant into an alley, he was unable to recall many of the circumstances surrounding the sales transaction (Tr. 116-117). The fact that 13 months had elapsed between the event and the trial explains, without justifying, the limitations of his testimony. Moreover, no explanation appears on the record for not calling the other two witnesses to a sale which only a few hours earlier the Appellant had refused to make.

No more of a showing should be required. In Tatum v. United States, 101 U.S. App. D.C. 373, 190 F. 2d 612 (1951), this Court said:

> We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." . . . (p. 617)

A similar conclusion was reached in U. S. v. O'Connor, 237 F. 2d 466 (2d Cir. 1956):

> A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be. United States v. Indian Trailer Corp., 7 Cir., 1955, 226 F.2d 595, 598; . . . (p. 474)

In the following cases the courts have reversed convictions where the issue of entrapment was either not submitted to the jury or was submitted on improper instructions. United States v. Sawyer, 210 F. 2d 169 (3rd Cir., 1954); United States v. Sherman, 200 F. 2d 880 (2nd Cir., 1952), reversed on other grounds 356 U.S. 369, 78 S. Ct. 819 (1958); Lufty v. United States, 198 F. 2d 760 (9th Cir., 1952); Yep v. United States, 83 F. 2d 41 (10th Cir., 1936); Wall v. United States, 65 F. 2d 993 (5th Cir., 1933); Jarl v. United States, 19 F. 2d 891 (8th Cir., 1927); Di Salvo v. United States, 2 F. 2d 222 (8th Cir., 1924).

On facts not substantially dissimilar from this case, this Court reached a similar conclusion in the case of Trent v. United States, 109 U.S. App. D.C. 152, 284 F. 2d 286 (1960), cert. denied, 365 U.S. 889, 81 S. Ct. 1035 (1961):

> The issue of entrapment was properly submitted to the jury under appropriate instructions. This record does not show as a matter of law, as contended by appellant and by the dissent, that the police or any police informant "had convinced an otherwise unwilling person to commit a criminal act." Quite the contrary the evidence shows that appellant "was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade." (p. 288)

More recently in the case of Nickens v. United States, 323 F. 2d 808 (App. D.C. 1963), this Court said:

> Appellant also suggests that the evidence showed entrapment as a matter of law. It did not, though it did raise the question of entrapment for the fact finder to decide.

> The law on entrapment in this Circuit has been clearly stated. When the evidence shows that a Government agent or intermediary has induced the commission of an offense, the issue of entrapment is raised for decision and, as was pointed out by Judge Burger, speaking for this court in Trent v. United States, supra, Note 7, 109 U.S. App. D.C. at 154, n. 2, 284 F.2d at 288, n. 2, a "sale to an officer or police agent is always one induced by the purchaser." (p. 815)

No doubt the leading case on this subject in this Circuit is Johnson v. United States, 317 F. 2d 127 (App. D.C. 1963), the facts of which and the Court's conclusion on the issue of entrapment are quoted below:

> . . . Thus the conduct charged as criminal could be found to be attributable to the action of the officer (1) in supplying Government funds for the purchase of the narcotics, (2) through the direct channel of an intermediary to the accused, (3) allowing the accused after the purchase and in the presence of the officer to retain some of the narcotics, (4) the officer at all times providing transportation for the execution of the plan.
>
> * * * *
>
> . . . But appellant was entitled to have the question submitted to the jury for its decision under an appropriate instruction. Such an instruction was requested and denied. For this reason we shall grant a new trial.
>
> Inducement of course may take different forms. Here the evidence does not show, as sometimes is the case, that personal importuning or coercive tactics were used by the officer to persuade appellant. We do have, however, the furnishing by the officer of Government money, itself a persuasive factor, to an intermediary acting for the officer in carrying out the transaction, with a "reward" to the accused of a part of its fruit. This is enough to raise a

> factual issue of official inducement for the jury to decide one way or the other. While the "reward" was taken after the purchase, the jury could infer from the previous circumstances that hope of reward played a part in the transaction. (p. 128)

II. THE DELAY OF 13 MONTHS BETWEEN THE OFFENSE AND TRIAL EITHER CONSTITUTED A DENIAL OF CONSTITUTIONAL GUARANTEES OR REQUIRED MORE THAN THE UNCORROBORATED TESTIMONY OF A SINGLE WITNESS FOR CONVICTION.

A. A Delay of over 13 Months between the Offense and Trial Constituted a Denial of the Constitutional Guarantees of Due Process or a Speedy Trial.

The Appellant in this case was charged with the illegal sale of heroin to an undercover agent of the Narcotics Squad on August 23, 1962. He was not tried until October 1, 1963. The indictment is dated January 14, 1963 and the plea of not guilty was entered March 1, 1963. Three of the 13 months between the offense and trial may be explained by the fact that the Appellant was committed to St. Elizabeths Hospital at the request of his counsel for psychiatric examination. The remaining 10 months delay is unexplainable.

The legal implications for a lesser delay were recently considered by this Court in the case of Nickens v. United States, 323 F. 2d 808 (App. D.C. 1963), which involved a delay of 9 months between the arrest and trial, 90 days of which were explained by the appellant's commitment for mental examination. Although the Court concluded that the delay was not unreasonable, the majority recognized that a longer

delay might constitute a denial of due process:

> This is not to suggest that delay between offense and prosecution could not be so oppressive as to constitute a denial of due process.
>
> * * * *
>
> Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused; . . . (p. 810)

The concurring opinion of Judge Wright suggests that purposeful delays are likewise forbidden by the Sixth Amendment, as to which no showing of prejudice is required.

> In Pollard v. United States, 352 U.S. 354, 361-362, 77 S.Ct. 481, 1 L.Ed. 2d 393 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted United States v. Provoo, 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761 (1955), affirming mem. Petition of Provoo, D.Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the government." In the case before us, where the delay was caused by acts of the Government which were both "purposeful" and "deliberate," careful scrutiny is demanded by the exacting mandate of the Sixth Amendment.
>
> * * * *
>
> A showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. Taylor v. United States, supra; Petition of Provoo, supra, at 203; United States v. Lusman, 2 Cir., 258 F.2d 475 (1958), cert. denied, 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed. 2d 109 (1958). On the contrary, the Government bears the burden of proving "that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay." Williams v. United States, supra, 102 U.S. App. D.C. at 53, 250 F.2d at 21. (pp. 812, 814-5)

The difficulties which were presented in this case by reason of the delay between the offense and trial are evident from the limited recollection of the narcotics agent on whose testimony Roy's conviction is based. The agent was unable to say where he first met the Appellant (Tr. 39, 42, 43); how many meetings he had with the Appellant (Tr. 44, 45); whether he had previously discussed narcotics with him (Tr. 51); the conversation which took place at the time of the sale which is the basis for this prosecution (Tr. 112, 116, 120); or what the Appellant was wearing at the time of the alleged sale (Tr. 113, 114, 116). Moreover, the agent had the benefit of notes or reports which had been made at the time of the transaction in question.

Trial counsel was appointed on March 13, 1963 -- almost 7 months after the offense, and in the Affidavit in Support of Motion for Mental Examination, dated April 26, 1963, trial counsel made the following statement:

> In response to these inquiries and admonitions of counsel, Roy has displayed a very vague, imperfect and sometimes incoherent recollection of his activities, whereabouts and associa tions during the year 1962 and the period covered by his indictment.

The effect of the delay was aggravated by the fact that the defendant had an intelligence level well below average. He was an addict (Tr. 372, 402), considered to be "chronically maladjusted" (Tr. 309, 424), and had an IQ of only 86 (Tr. 273). While Roy may not have had a mental illness (Tr. 405, 434), as the defense contended, the record clearly sup-

ports counsel's claim concerning the difficulty of preparation for trial.

B. Because of the Delay of over 13 Months between the Offense and Trial, the Uncorroborated Testimony of a Narcotics Agent Does Not Satisfy the Quantitative Requirements of Proof.

This Court has clear authority to establish the standards of proof in criminal cases in the District Court. In the case of Kelly v. United States, 90 U.S. App. D.C. 125, 194 F. 2d 150 (1952), the Court made the following statements:

> /1/ It is established that we have authority to prescribe for this jurisdiction rules relating to proof in criminal cases. Indeed, there is upon us the responsibility for "Matters relating to law enforcement in the District". We have in the past established such rules. For example, in respect to rape, we have held that the testimony of the prosecutrix must be corroborated by evidence as to the circumstances surrounding the parties at the time; we have held that if a drug addict is a prosecution witness the accused is entitled as of right to an instruction that such evidence must be viewed with suspicion and received with great caution; and we have held that an accused is entitled as of right to an instruction that the testimony of an accomplice must be received with suspicion and the greatest caution. (p. 152)
>
> So there is ample precedent for a ruling by this court that in certain cases the uncorroborated testimony of one witness will not support a conviction; or for a peremptory requirement that an instruction that certain types of evidence must be viewed with suspicion and received with caution, must be given; or for a mere precautionary admonition to the trial courts as to the proper course in certain circumstances. (p. 153)

More recently in the case of Wilson v. United States, No. 17,875, App. D.C., Feb. 13, 1964, the Court reviewed a conviction for a narcotics violation, which rested on the uncorroborated testimony of a narcotics agent, where the arrest came 6 months after the sale and the trial followed 3 months later. The dissenting opinion notes the Ross case, which is strikingly similar to the case at bar:

> In Ross v. United States, No. 17877 (see Order remanding to the District Court for further proceedings, Jan. 28, 1964), a narcotics officer testified he had been undercover for nine months, during which time he made purchases from 51 different people. He testified he could not recall the details of the transactions without looking at his notes.

The dissenting opinion in Wilson goes on to emphasize that prolonged delays are becoming the pattern in narcotics cases:

> Here the delay was six months. In Nickens v. United States, supra, the delay was seven and one-half months. In Ross v. United States, No. 17877, where the delay was seven months, we have remanded to the District Court to conduct a hearing on the "reasonableness vel non of the delay occurring between the alleged offense by appellant and the appellant's arrest therefor, and its effect, if any, on the defense of the case." (Order, Jan. 28, 1964). Other cases which have been and are now before this court seem to show that such a delay is the prevailing pattern in narcotics cases.

Under these circumstances the dissenting opinion of Chief Judge Bazelon, with whom Judge Wright concurs, concludes as follows:

> At the very least, the Government should be required in each case to justify its delay. Beyond that, assuming that this method of law enforcement is to be allowed,

> we should recognize the onerous burden it puts on the defendant. We should then consider whether additional proof from the Government is required in order to dispel obvious misgivings about convicting a defendant whose ability to defend himself has been substantially impaired.

III. THE HARRISON NARCOTICS ACT IS UNCONSTITUTIONAL AS TO A CONTRABAND NARCOTIC.

A. The Harrison Narcotics Act Cannot Reasonably Be Regarded as a Revenue Act as Applied to a Contraband Narcotic.

Heroin has been declared contraband by Congress. 70 Stat. 572, 18 U.S.C. 1402; U. S. v. Contrades, 196 F. Sup. 803 (D.C., Hawaii, 1961). It has no legal use in the District of Columbia; it is not even used medicinally. It is not possible for importers, manufacturers, wholesale dealers, retailers, physicians, or those engaged in research to purchase revenue stamps for the packaging of heroin.[1/] Under these circumstances a severe penalty has been imposed for the violation of a law with which compliance is impossible. As applied to heroin, this statute is a mere pretext as a tax measure; the fact that it is described as a revenue act doesn't make it one. Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449 (1922). A purported revenue act which is not directed toward the collection of taxes cannot be supported. Nigro v. United States, 276 U.S. 332, 48 S.Ct. 388 (1928).

1/ A copy of the Treasury Department's application form for the purchase of narcotics revenue stamps is attached as Appendix A.

The cases on this aspect of the constitutionality of the Harrison Narcotics Act pre-date the 1956 statute declaring heroin to be contraband, and would therefore appear to be inapplicable to the argument which is raised herein.

B. Compliance with the Requirements of Section 4704a and 4705a of the Harrison Narcotics Act Would Have Necessitated an Admission by Appellant of the Unlawful Possession of Heroin and thereby Infringed his Constitutional Guarantee against Self-Incrimination.

The revenue stamps required by Section 4704a and the order forms required by Section 4705a are available only to persons registered under Section 4722 of the Harrison Narcotics Act. The application for such registration, had it been attempted by Appellant, would have necessitated his admission of the possession of heroin (as appears on the form attached as Appendix A), which of course is illegal under federal law. As applied therefore to a contraband narcotic, compliance with the Harrison Narcotics Act requires the criminal to report his crime.

A related problem was involved in the case of Russell v. United States, 306 F. 2d 402 (9th Cir., 1962), where the court held that a required registration of firearms necessitated unconstitutional self-incrimination, since it presupposed unlawful possession. In reaching this decision the court made the following distinction with the cases involving the occupational tax on the business of accepting wagers in those jurisdictions where gambling is illegal:

> The distinction between these cases and the one now before us is readily apparent. Unlike Kahriger and Lewis, Russell was required, under section 5841, to provide information as to past conduct (or present status) which was actually or presumptively unlawful. There was thus present the very circumstance which the Supreme Court, in Kahriger and Lewis found it necessary to negate in order to sustain the registration provisions of the wagering tax statutes there in question. (p. 410)

IV. ROY WAS IMPROPERLY SENTENCED AS A SECOND OFFENDER.

In June, 1955, at the age of 17 (Tr. 561), Roy was convicted of a narcotics violation and sentenced under the Youth Correction Act, 64 Stat. 1085, 18 U.S.C. sec. 5010(b). Because of this fact he was, over counsel's objection, in this case sentenced as a second offender. This was in error for the following reasons:

A. Section 7237(c)(1) Must Be Strictly Construed in Favor of Appellant.

Section 7237(c)(1) defines a second offender as one who "previously has been convicted of any offense, the penalty for which was provided in subsection (a) or (b) of this section or in (other statutes relating to narcotics)." (Emphasis supplied.) This statutory language is to be distinguished from "a penalty for which is (or may be) provided," which seems to be the interpretation employed by the trial court (Tr. 581). "The penalty" for defendant's first narcotics violation "was provided" in the Youth Cor-

rection Act and not in any of the statutes enumerated in section 7237(c)(1).

As the Supreme Court repeatedly has held, "'the law is settled that penal statutes are to be strictly construed' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" Commissioner of Internal Revenue v. Acker, 361 U.S. 87, 91, 80 S.Ct. 144, 145, 147 (1959).

At the very least the statute is ambiguous. On the one hand, it could mean, as Appellant contends, "the penalty actually given." On the other hand, it might mean the penalty which was specified in one of the enumerated statutes and which could have been imposed upon Appellant.[1/] In the first instance, Appellant would not be a second offender, and in the second, he would be. Any question as to how to resolve such an ambiguity has been answered many times by the Supreme Court; it is to adopt the less harsh meaning.

In the case of Ladner v. United States, 358 U.S. 169, 177 (1958), the Court, faced with the same sort of ambiguity, held as follows:

> Neither the wording of the statute nor its legislative history[2/] points clearly to

---

1/ Several meanings of the word "provided" are given by the dictionary. One meaning is "to furnish" which in turn means "to supply; give." Another meaning of "provided" is "to stipulate." Webster's New Collegiate Dictionary, 337, 680.

2/ There is nothing in the legislative history of amended sec. 7237 which helps resolve the ambiguity of the meaning of the word "provided." See 1956 U.S. Cong. Code and Adm. News, pp. 3274-3321.

> either meaning. In that circumstance, the Court applies a policy of lenity and adopts the less harsh meaning. . . . This policy of lenity means that the Court will not interpret a Federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

This holding clearly is controlling in the present case.

B. Treating Appellant as a Second Offender in this Case Would Nullify by Implication the System of Treatment and Rehabilitation Established by Congress in the Youth Corrections Act.

With the passage of the Federal Youth Corrections Act in 1950, Congress made available for the discriminatory use of the Federal judges:

> /A/ system for the sentencing and treatment of persons under the age of 22 years who have been convicted of crime in United States courts that will promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens, and so will avoid degenerative and needless transformation of many of these young persons into habitual criminals. . . . The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation. House Report, 1950 U.S. Cong. Code and Adm. News, pp. 3983-3985.

The initial question is whether the amendment of 26 U.S.C. sec. 7237 in 1956, imposing more severe mandatory penalties on narcotics offenders, nullifies the system of treatment and rehabilitation insofar as youthful narcotics

offenders are concerned. The answer clearly is no. In United States v. Lane, 284 F. 2d 935 (2d Cir. 1960), the court held that no probation could be granted to a youthful narcotics offender under the Youth Corrections Act because of the absolute prohibition upon probation in subsection (d) of sec. 7237. But the court went on to say that aside from this express prohibition, "the provisions designed to effectuate the broad purposes of Congress in enacting the Federal Youth Corrections Act remain in full force today. . . . All procedures of the Federal Youth Corrections Act, except those relating to suspension and probation by the trial judge, remain in effect." 284 F. 2d at 941.

Thus, when the Appellant was put in the custody of the Attorney General in 1955 for treatment and supervision, he was not given a "penalty" as that word was then used in sec. 7237. As the Lane case makes clear, he was not given a "penalty" as that word was used in the 1956 amendment of sec. 7237. Yet to treat Appellant as a second offender under sec. 7237(c)(1) imposes a drastic "penalty". Until Congress clearly states that such "retributive punishment" is to be the consequence of a Youth Corrections Act sentence, it should not be arrived at merely by implication and guesswork.

A further reason for not implying such a drastic result is that when Congress desired to exclude narcotics offenders from the Youth Corrections Act, it clearly said so.

In 1958, Congress enacted Public Law 85-752, codified as 18 U.S.C. Sec. 4209, under which district courts, in exceptional cases, are authorized to sentence under the provisions of the Youth Corrections Act defendants who are between the ages of 22 and 26 at the time of conviction. Section 7 of Public Law 85-752 provides that the Act does not apply to any offense for which a mandatory penalty is required by statute, and specifically refers to the Narcotics Laws. 1958 U.S. Cong. Code, Adm. News, p. 3891. Congress has never said anything about excluding youthful narcotics offenders under the age of 22.

C. A Serious Constitutional Question Would Be Raised by Treating Appellant as a Second Offender.

Under 26 U.S.C. sec. 7237, severe mandatory penalties are applied to second or subsequent offenders without regard to whether the narcotics violations are the product of narcotics addiction or the product of a vicious mind unclouded by addiction. The evidence in this case showed conclusively that Appellant is an addict and that the crime with which he is charged was the product of addiction. Yet, the system of increased penalties for repeated offenses as applied to an addict tend to make the severity of the punishment directly proportionate to the severity of the addiction and not proportionate to the degree of culpability.

Such a result raises serious question under the recent

case of Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417 (1962), as to whether sentencing defendant as a second offender would inflict a cruel and unusual punishment in violation of the Eighth Amendment. For this reason as well, such a penalty should not be imposed upon Appellant until Congress speaks in language that is clear and definite.

V. CONCLUSION.

For the foregoing reasons, the judgment of the trial court should be reversed and this case remanded.

Respectfully submitted,

Jerrold Scoutt, Jr.
412 Cafritz Building
Washington 6, D. C.

Attorney for Appellant
(Appointed by this Court)

March 6, 1964

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered this 6th day of March, 1964, to David C. Acheson, United States Attorney.

Jerrold Scoutt, Jr.

Form 678 (Rev. 4–61)
U.S. Treasury Department
Internal Revenue Service

SPECIAL TAX RETURN: APPLICATION FOR REGISTRY AND SPECIAL-TAX STAMP-OPIUM, ETC.

THIS RETURN MUST BE COMPLETED AND FILED WITH YOUR DISTRICT DIRECTOR

Name *(or Trade Name)*, number, street, city, county, State

Registration Number

Occupation

Employer Identification No., if any

FOR DISTRICT DIRECTOR'S USE ONLY

Do you have any narcotics on hand? ☐ No ☐ Yes *(If "Yes," see instr.)*

Return Number

Date Issued

For Period Beginning

Enter State Professional License or Certificate No. Date

Enter State Store or Business Registration No. Date

Tax $

Penalty

Interest

Total $

Enter *(Month)* *(Year)*

Class of Tax *(Check)*

☐ Class 1 ☐ Class 2

☐ Class 3 ☐ Class 4

Class 5 ☐ (M) ☐ (D) ☐ Class 6

Marihuana *(Enter class)* _____

Enter amount due

$ _____

Make check or money order payable to Internal Revenue Service

Change of Location ☐ *(Date)* _____ Change of Ownership ☐ *(Date)* _____

Name of Former Owner

First Application

Last Business or Occupation

Address

Name of Former Employer

Address

I declare under the penalties of perjury that the statements contained herein are true and correct to the best of my knowledge and belief; and the special-tax stamp herein applied for is to cover only the business indicated.

Signature | Title | Date

(State whether individual owner, member of firm, or, if officer of corporation, give title)

Failure to file on or before July 1 of each year (if in business after that date) will subject you to a penalty of $50.00

If firm or partnership, give name and residence of each member; if corporation, give name, residence, and title of each officer:		Date of Inventory

INVENTORY — ORIGINAL

List taxable narcotic drugs and preparations on hand this date. Attach supplemental sheets, if necessary.

Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*	Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*

INSTRUCTIONS

Persons required to register under the narcotics laws who conduct the business or profession without registering or properly renewing registration before July 1, are subject to a $50 penalty. If engaged in more than one business or profession or at more than one place of business, special tax must be paid for each separate business or profession and for each location. Register changes in address, ownership, or business name on Form 678 with the District Director within 30 days of each change (and attach unused narcotics order forms and special tax stamp) or incur liability to additional tax, interest and penalty. If 2 or more doctors prescribe or dispense narcotics from the same stock, they must be registered as a partnership and as individuals.

NARCOTICS

Persons in Class 1 who have paid special tax for that class are not required to pay, in addition, special tax in Class 2 or 3 when they sell only their own products or importations from the location covered by the Class 1 registration.

Tax for Classes 1, 2, 3, and 6, is to be paid proportionately from the first day of the month in which business began through June 30 following. Tax for Classes 4 and 5 must be paid for a full year regardless when business commenced. Do not pay tax for Class 5 if tax is paid for Class 1, 2, 3, or 4.

Persons in Class 3, 4, 5, or 6 must furnish an inventory of narcotics on hand. See reverse side of form. A duplicate inventory must be retained for inspection.

Class 1 (and 5) ($24 per year) - Importers, manufacturers, producers, or compounders.
Class 2 (and 5) ($12) - Wholesale dealers.
Class 3 (and 5) ($3) - Retail dealers.
Class 4 (and 5) ($1) - Physicians, dentists, veterinary surgeons, and other practitioners.
Class 5 (M) ($1) - Manufacturers of untaxed narcotic preparations.
Class 5 (D) ($1) - Dealers in untaxed narcotic preparations. (Persons who sell preparations of any kind containing a narcotic drug in quantity exempted from payment of tax.)
Class 6 ($1) - Persons engaged in research, instruction, or analysis.

MARIHUANA

Persons in Class 1 who have paid special tax for that class are not required to pay, in addition special tax in Class 3 when they sell only their products or importations from the location covered by Class 1 registration.

Tax for Classes 1 and 3 is to be paid proportionately from the first day of the month in which business began through June 30 following. Tax for Classes 2, 4, 5, and 6 must be paid for a full year regardless when business commenced.

Persons in Class 3, 4, or 5 must furnish an inventory of narcotics on hand. See reverse side of form. A duplicate inventory must be retained for inspection.

Class 1 ($24 per annum) - Importers, manufacturers, and compounders.
Class 2 ($1) - Producers, except those included in Class 5.
Class 3 ($3) - Dealers other than those registered in Class 4.
Class 4 ($1) - Physicians, dentists, veterinary surgeons, and other practitioners.
Class 5 ($1) - Persons engaged in research, instruction or analysis.
Class 6 ($1) - Millers.

If firm or partnership, give name and residence of each member; if corporation, give name, residence, and title of each officer:

Date of Inventory

DUPLICATE

Fold forward and insert carbon

INVENTORY

List taxable narcotic drugs and preparations on hand this date. Attach supplemental sheets, if necessary.

Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*	Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*

U.S. GOVERNMENT PRINTING OFFICE : 1961 OF—[illegible]

APPENDIX A

TREASURY DEPARTMENT APPLICATION FORM FOR NARCOTICS REVENUE STAMPS

THIS RETURN MUST BE COMPLETED AND FILED WITH YOUR DISTRICT DIRECTOR

Form 678 (Rev. 4-61)
U.S. Treasury Department
Internal Revenue Service

SPECIAL TAX RETURN: APPLICATION FOR REGISTRY AND SPECIAL-TAX STAMP- OPIUM, ETC.

Name *(or Trade Name)*, number, street, city, county, State

Registration Number

Occupation

Employer Identification No., if any

FOR DISTRICT DIRECTOR'S USE ONLY

Return Number

Do you have any narcotics on hand?
☐ No ☐ Yes *(If "Yes," see instr.)*

Date Issued

For Period Beginning

Enter State Professional License or Certificate No. Date

Enter State Store or Business Registration No. Date

Tax $

Penalty

Interest

Total $

Enter *(Month)* *(Year)*

Change of Location ☐ *(Date)* _____

Change of Ownership ☐ *(Date)* _____

Name of Former Owner

Class of Tax *(Check)*

☒ Class 1 ☐ Class 2

☐ Class 3 ☐ Class 4

Class 5
☐ (M) ☐ (D)

☐ Class 6

Marihuana
(Enter class) _____

Enter amount due
$ _____

Make check or money order payable to Internal Revenue Service

First Application

Last Business or Occupation

Address

Name of Former Employer

Address

I declare under the penalties of perjury that the statements contained herein are true and correct to the best of my knowledge and belief; and the special-tax stamp herein applied for is to cover only the business indicated.

_____ Signature

_____ Title

_____ Date

(State whether individual owner, member of firm, or, if officer of corporation, give title)

Failure to file on or before July 1 of each year (if in business after that date) will subject you to a penalty of $50.00

APPENDIX A

TREASURY DEPARTMENT APPLICATION FORM FOR NARCOTICS REVENUE STAMPS

If firm or partnership, give name and residence of each member; if corporation, give name, residence, and title of each officer:	Date of Inventory
	ORIGINAL

INVENTORY

List taxable narcotic drugs and preparations on hand this date. Attach supplemental sheets, if necessary.

Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*	Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*

INSTRUCTIONS

Persons required to register under the narcotics laws who conduct the business or profession without registering or properly renewing registration before July 1, are subject to a $50 penalty. If engaged in more than one business or profession or at more than one place of business, special tax must be paid for each separate business or profession and for each location. Register changes in address, ownership, or business name on Form 678 with the District Director within 30 days of each change (and attach unused narcotics order forms and special tax stamp) or incur liability to additional tax, interest and penalty. If 2 or more doctors prescribe or dispense narcotics from the same stock, they must be registered as a partnership and as individuals.

NARCOTICS

Persons in Class 1 who have paid special tax for that class are not required to pay, in addition, special tax in Class 2 or 3 when they sell only their own products or importations from the location covered by the Class 1 registration.

Tax for Classes 1, 2, 3, and 6, is to be paid proportionately from the first day of the month in which business began through June 30 following. Tax for Classes 4 and 5 must be paid for a full year regardless when business commenced. Do not pay tax for Class 5 if tax is paid for Class 1, 2, 3, or 4.

Persons in Class 3, 4, 5, or 6 must furnish an inventory of narcotics on hand. See reverse side of form. A duplicate inventory must be retained for inspection.

Class 1 (and 5) ($24 per year) - Importers, manufacturers, producers, or compounders.
Class 2 (and 5) ($12) - Wholesale dealers.
Class 3 (and 5) ($3) - Retail dealers.
Class 4 (and 5) ($1) - Physicians, dentists, veterinary surgeons, and other practitioners.
Class 5 (M) ($1) - Manufacturers of untaxed narcotic preparations.
Class 5 (D) ($1) - Dealers in untaxed narcotic preparations. (Persons who sell preparations of any kind containing a narcotic drug in quantity exempted from payment of tax.)
Class 6 ($1) - Persons engaged in research, instruction, or analysis.

MARIHUANA

Persons in Class 1 who have paid special tax for that class are not required to pay, in addition special tax in Class 3 when they sell only their products or importations from the location covered by Class 1 registration.

Tax for Classes 1 and 3 is to be paid proportionately from the first day of the month in which business began through June 30 following. Tax for Classes 2, 4, 5, and 6 must be paid for a full year regardless when business commenced.

Persons in Class 3, 4, or 5 must furnish an inventory of narcotics on hand. See reverse side of form. A duplicate inventory must be retained for inspection.

Class 1 ($24 per annum) - Importers, manufacturers, and compounders.
Class 2 ($1) - Producers, except those included in Class 5.
Class 3 ($3) - Dealers other than those registered in Class 4.
Class 4 ($1) - Physicians, dentists, veterinary surgeons, and other practitioners.
Class 5 ($1) - Persons engaged in research, instruction or analysis.
Class 6 ($1) - Millers.

APPENDIX A

TREASURY DEPARTMENT APPLICATION FORM FOR NARCOTICS REVENUE STAMPS

If firm or partnership, give name and residence of each member; if corporation, give name, residence, and title of each officer:		Date of Inventory
		DUPLICATE **Fold forward and insert carbon**

INVENTORY

List taxable narcotic drugs and preparations on hand this date. Attach supplemental sheets, if necessary.

Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*	Name and Description of Drug or Preparation *(If in pill or tablet form, give size of pill or tablet)*	QUANTITY *(Gals., pts., lbs., ozs., etc.)*

U.S. GOVERNMENT PRINTING OFFICE : 1961 O?—593696

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,285

ARTHUR M. ROY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
ALAN KAY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

An undercover officer assigned to mingle and associate with narcotics users and peddlers became acquainted with the appellant from occasional brief conversations on the street. Appellant thereafter asked the officer if he wished to purchase some narcotics and the officer purchased five capsules. No intermediary or Government vehicle was used to consumate the sale. The offer came from appellant rather than a request from the officer. The sale occurred in August, 1962, the arrest warrant was issued in December, 1962, and the first trial date was set for March 18, 1963. With the exception of a five 'court' day interval caused by a congested trial calendar, each continuance until the trial date of September 26, 1963, was at appellant's request. In view of the foregoing, appellee submits that the following questions are presented:

1) Whether the delay between the commission of the offense and the trial requires this Court to find that appellant's right to a speedy trial was violated.

(a) Where appellant was not arrested until approximately three months after a warrant for his arrest had been issued.

(b) Where, with the exception of five 'court' days, every continuance from the first trial date (March 18, 1963) until the date of trial (September 26, 1963) was occasioned by appellant.

(c) Where appellant did not raise the speedy trial issue in the court below.

2) Whether the trial court properly denied appellant's request for an instruction on the defense of entrapment.

(a) Where no evidence was adduced by the Government or the defense germane to that issue.

(b) Where appellant solicited the police officer to purchase the heroin.

(c) Where no intermediary was used and appellant did not testify that he was entrapped.

3) Whether the trial court erred in not granting appellant's motion for a judgment of acquittal based upon his assertion that the Harrison Narcotic Act is unconstitutional as it applies to heroin.

4) Whether the trial court erred in sentencing appellant as a second offender.

(a) Where he concedes that he was convicted in 1955 for a violation of the Harrison Narcotic Act.

(b) Where, although sentenced pursuant to the Youth Correction Act (18 U.S.C. § 5010(b)), appellant has never received a certificate pursuant to Section 5021 of the Act, setting aside his conviction.

INDEX

TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,285

ARTHUR M. ROY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On January 14, 1963, a three-count indictment was filed in the District Court charging appellant with violation of the Harrison Narcotic Act, 26 U.S.C. §§ 4704 (a), 4705(a) and 21 U.S.C. § 174.[1] At the conclusion of the trial which commenced on September 29, 1963, a jury found appellant guilty as charged (Criminal Case No. 26-63). After the conviction, the Government filed an information alleging that appellant had previously been

[1] Appellant was indicted with a co-defendant, George E. Toney, who was found to be incompetent to stand trial by Saint Elizabeth's Hospital on July 5, 1963.

convicted for a violation of the federal narcotic laws. On November 15, 1963, he was sentenced to concurrent terms of imprisonment of ten years on each count.

Events prior to trial

A warrant for appellant's arrest was issued on December 8, 1962. Appellant was apprehended on February 22, 1963. He was arraigned on March 1, 1963, and the trial date was set for March 18, 1963. On the latter date, appellant moved for a continuance until April 25, 1963, on the ground that additional time was needed to prepare the defense. On May 3, 1963, appellant's motion for a mental examination was granted. By letter dated July 30, 1963, the hospital informed the District Court that appellant was competent to stand trial and that he was not suffering from a mental disease or defect on the date of the alleged offenses. The following day appellant again requested a continuance of the trial date on the ground that additional time was needed to prepare the defense. The trial date was reset for September 19, 1963. The trial began on September 26, 1963. The five 'court' day interval between September 19, 1963, and September 26, 1963, resulted from a congested trial calendar in the District Court. No motion, oral or written, was made prior to or during trial alleging a violation of appellant's right to a speedy trial.

Proceedings at trial

On March 18, 1962, Officer Bush of the Narcotics Squad, Metropolitan Police Department, began an investigation in an undercover capacity (Tr. 36). Bush was instructed to work in a given area of Washington, D.C., mingle with drug traffickers and purchase illicit narcotics (Tr. 34). Sometime prior to July, 1962, Officer Bush became acquainted with the appellant, and he observed that appellant was frequently in the area covered by the investigation (Tr. 39-40). Until July 14, 1962, their sole contact consisted of salutatory greetings when

they passed on the street. Sometime in the middle of July, 1962, appellant approached the officer and asked him if he wanted to purchase some narcotics ("He asked me if I was looking") (Tr. 41). Apprehensive that appellant might try to sell him a milk-sugar compound, Bush asked appellant to "Wait a minute" and Bush then signalled to a group of narcotic users standing across the street. Appellant then stated "Never mind" and walked away (Tr. 41, 66, 69).

On August 23, 1962, at approximately 3:45 p.m., appellant met Bush on the corner of 8th and H Streets, N.E. (Tr. 20). This meeting was not prearranged (Tr. 117). Appellant spoke to Bush and asked him if he wanted to buy some narcotics (Tr. 21). Bush told appellant he could not purchase at that time. Later that day Bush again saw appellant who was at that time accompanied by the co-defendant, Toney (alias Summertime, Tr. 48) and an unknown female (Tr. 22). Bush saw the three individuals walk into an alley and he followed them. "As [Bush] I walked into the alley, I saw the defendant with a small bottle of white capsules in his hand. I told him I wanted five: The defendant looked at me and said, 'why didn't you get me down when I saw you before'" (Tr. 24-25). This question was translated by the officer to mean "why didn't you buy the narcotics when I saw you before?" (Tr. 25). Appellant then told Bush to pay the co-defendant, Toney; he told the female to watch the street, and gave Bush five capsules (Tr. 65). The capsules were latter analyzed and found to contain heroin hydrochloride (Tr. 28-29, 174). While he was in the alley the officer observed appellant sell some capsules to another individual named Few (Tr. 27).

At the conclusion of the Government's case, appellant moved for a judgment of acquittal on counts one and two (26 U.S.C. §§ 4704(a), 4705(a)) and to dismiss the third count (21 U.S.C. § 174). The motion to dismiss the third count was based upon appellant's contention that the legislative presumption that flows from possession of narcotics is unconstitutional. The motion for

judgment of acquittal was predicated upon the alleged unconstitutionality of the Harrison Narcotic Act as it applies to heroin and upon the defense of entrapment. After all the defense motions had been argued and denied, the appellant called two lay and two expert witnesses to establish the defense of insanity. No other theory of defense was adduced from the defense witnesses.[2]

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

Title 18 U.S.C. § 1402 provides:

> Any heroin lawfully possessed prior to the effective date of this Act shall be surrendered to the Secretary of the Treasury, or his designated representative, within one hundred and twenty days after the effective date of the Act, and each person making such surrender shall be fairly and justly compensated therefor. The Secretary of the Treasury, or his designated representatives, shall formulate regulations for such procedure. All quantities of heroin not surrendered in accordance with this section and the regulations promulgated thereunder by the Secretary of the Treasury, or his designated representative, shall by him he declared contraband, seized, and forfeited to the United States without compensation. All quantities of heroin received pursuant to the provisions of this section, or otherwise, shall be disposed of in the manner provided in section 4733 of the Internal Revenue Code of 1954, except that no heroin shall be distributed or used for other than scientific research purposes approved by the Secretary of the Trreasury, or his designated representative

[2]Appellant did not testify on his own behalf.

Title 21 U.S.C. § 174 provides:

> *Same: penalty: evidence.*—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570).

Title 26 U.S.C. § 4704(a)—General requirement provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. § 4705(a)—General requirement provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegates.

Title 26, U.S.C. § 7237(c)(1), provides in pertinent part:

> For purposes of subsection (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C. sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in— * * *

SUMMARY OF ARGUMENT

I

Appellant's constitutional right to a speedy trial was not violated when he was prosecuted for an offense he committed thirteen months prior to trial. The four-month interval between the offense and the issuance of a warrant for his arrest was justified by the necessity of maintaining the undercover status of the officer to whom appellant sold the heroin, until he had completed his investigation. Appellant did not object to that delay by moving to dismiss the indictment prior to trial, nor did he indicate to the trial court that he was prejudiced by such delay.

The interval between indictment and trial similarly did not violate appellant's constitutional rights. With the exception of a delay amounting to five court days, every

postponement of the trial date was at appellant's behest. None of the delay can be attributed to the Government. Under these circumstances, appellant should not be heard to complain of a delay of his own making.

II

On two different occasions appellant solicited a police officer to purchase narcotics. The police officer did not use an intermediary, nor did he request, persuade or coerce appellant to commit the offense. On the date of the offense appellant asked the officer if he wanted to buy narcotics. The sale was made a few hours after this offer. The officer did not request narcotics from appellant, nor did he cause appellant to be in possession of a quantity of heroin at the time the sale was made; in fact, appellant made another sale at approximately the same time the purchase was made by the officer. Presented with these facts the trial court properly refused to instruct the jury on the defense of entrapment.

III

The Harrison Narcotic Act is not constitutionally defective because the revenue obtained therefrom is negligible or even non-existent. Appellant contends that the Narcotics Control Act of 1956 (18 U.S.C. 1402) prohibits all lawful possession of heroin and therefore the constitutional validity of the Harrison Narcotic Act can no longer be upheld as a proper exercise of Congress' taxing power. This argument is premised upon a misconstruction of 18 U.S.C. 1402.

Even assuming that the 1956 Act effectively prohibited any lawful possession of heroin, Congress is still empowered to tax illicit items or activity. That a tax statute results in destroying the article taxed does not impair the constitutionality of the statute. Congress has frequently resorted to its taxing power as an incidental means of regulation. If Congress has validly exercised its taxing power over the subject matter, the fact that

the tax or its regulation is incidentally self-destructive does not make the enactment constitutionally defective.

Contrary to appellant's assertion, the Narcotics Control Act of 1956 (18 U.S.C. § 1402) does not prohibit all legal possession of heroin. Section 1402 simply requires all heroin lawfully possessed prior to 1956 to be surrendered to the Secretary of the Treasury. The section is not a criminal statute and it applies only to heroin then in existence. Hence, appellant's contention that it is legally impossible to obtain revenue from a tax on heroin, is erroneous.

IV

Appellant was properly sentenced as a second offender. Appellant was convicted of violating the Harrison Narcotic Act in 1955. The trial court in the exercise of its discretion sentenced appellant as a youth offender (18 U.S.C. 5010(b)) in lieu of the penalty provided by 26 U.S.C. 7237. Since appellant's prior conviction had not been set aside as provided by 18 U.S.C. 5021, his previous conviction classifies him as a second offender within the definition of "second offender" described in 26 U.S.C. § 7237. Appellant maintains that it is the penalty imposed that is determinative of whether he should be sentenced as a second offender, we submit that it is the prior conviction that is determinative.

ARGUMENT

I. Appellant was not denied the right to a speedy trial

(Tr. 25-26, 36)

A. *In the circumstances of this case, the interval between the offense and arrest does not constitute a violation of the right to a speedy trial.*

Appellant unlawfully sold heroin to an undercover officer of the Metropolitan Police Department on August 23, 1962 (Tr. 25-26). The undercover investigation was

completed on December 5, 1962 (Tr. 36). On this date a warrant was issued for appellant's arrest (Tr. 36). The four-month interval between the offense and the issuance of the arrest warrant provides no basis for appellant's contention that he was denied a speedy trial. In *Nickens* v. *United States*, —— U.S. App. D.C. ——, 323 F.2d 808 (1963), this Court found no constitutional infirmity in an interval of more than seven months between the commission of the offense and the arrest. Similarly in the following cases this Court has upheld time intervals longer than that of the instant case, *Wilson* v. *United States*, No. 17,895, decided October 3, 1963, *reh. denied*, February 13, 1964 (six months); *Redfield* v. *United States*, No. 17,818, decided January 30, 1964 (over five months); *Vincent Wilson* v. *United States*, Misc. No. 2173, leave to appeal *in forma pauperis* denied, January 10, 1964 (seven months). The decisions in Nickens and Wilson clearly reject any constitutional infirmity that appellant may assign to the interval between the commission of the offense and the issuance of the arrest warrant.

B. *The interval between the issuance of the arrest warrant and trial does not constitute a violation of the right to a speedy trial.*

An arrest warrant for appellant was issued on December 5, 1962; his trial began on September 26, 1963. Appellant argues that this delay coupled with the delay between offense and issuance of the arrest warrant constitutes a denial of his constitutional right to a speedy trial. This contention can be initially answered by reviewing the events between December 5, 1962, and the date of trial:[3]

December 5, 1962 — Arrest warrant issued.

January 14, 1963 — Indictment filed.

February 22, 1963 — Appellant arrested pursuant to a bench warrant.

---

[3] See notations on District Court file (Criminal Case No. 26-63).

February	23, 1963	— Preliminary hearing before U.S. Commissioner; bail set.
March	1, 1963	— Arraignment
March	18, 1963	— Trial date continued until April 25th, 1963, on motion of defense counsel for more time to prepare the case.
April	5, 1963	— Motion of appellant's co-defendant for ninety-day mental examination granted.
April	8, 1963	— Trial date continued until August 5, 1963.
May	3, 1963	— Appellant's motion for a ninety-day mental examination granted.
July	30, 1963	— Saint Elizabeths Hospital reported to the District Court that appellant was competent to stand trial, was a narcotic addict but was not suffering from a mental disease or defect.
July	31, 1963	— Oral motion of defense counsel for a continuance to September 19, 1963—additional time needed to prepare the defense.
September	19, 1963	— Trial continued until September 25, 1963—Criminal courts engaged in trial.
September	25, 1963	— Trial continued to the following day—Criminal courts engaged in trial.
September	26, 1963	— Trial commenced.

We submit that a review of the reasons causing the delay between arrest and trial is sufficient to refute appellant's assertion that his constitutional right to a speedy trial was violated.

A relevant factor to the issue of a speedy trial is the cause of the delay. In the instant case the delays were not "purposeful or oppressive,"[4] to the contrary, with exception of a five 'court' day continuance caused by a congested trial calendar, every continuance was at appellant's behest. Appellant cannot point to a delay of one day that was caused by the prosecution. *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F.2d 567, *cert. de-*

[4] *Pollard* v. *United States*, 352 U.S. 354, 361 (1957).

nied, 359 U.S. 998 (1959). Notwithstanding the fact that appellant did not raise the speedy trial issue in the court below, upon these facts it is manifest that appellant is unable to show prejudice and the assertion that his constitutional right to a speedy trial was violated is completely without merit. *James* v. *United States,* 104 U.S. App. D.C. 263, 261 F.2d 381 (1958).

C. ***Notwithstanding the interval between offense and trial the police officer's testimony that appellant sold him narcotics is sufficient to sustain the conviction.***

Appellant maintains that his conviction cannot be sustained on the basis of the uncorroborated testimony of Officer Bush given thirteen months after the sale was made. This Court has recently rejected that contention in *Wilson* v. *United States,* No. 17,895, decided October 3, 1963, *reh. en banc denied,* February 13, 1964:

> We have heretofore held on several occasions that the uncorroborated testimony of a narcotics agent is sufficient to support conviction for violation of the narcotics laws. See *Morgan* v. *United States,* —— U.S. App. D.C. ——, 319 F.2d 711 (1963). It is also well settled that the verdict of the jury must be sustained if there is substantial evidence taking the view most favorable to the Government.

In addition to the fact that six months of the thirteen-month interval was caused by the appellant, the jury was free to accept or reject the testimony of the police officer. The verdict reflects that the jury believed the officer and no reason has been given to disturb that verdict.

II. In view of the complete absence of evidence from which the jury might conclude that appellant's offense was produced by the Government, the trial court properly refused to instruct on the defense of entrapment.

(Tr. 18-30, 39, 41, 174)

Only if a theory of defense is supported by the evidence need the trial court submit it to the jury. *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 613 (1951). Appellant's assertion that the trial court improperly refused to instruct the jury on the theory of entrapment is based solely upon his view of the testimony of the undercover officer. Appellant introduced no evidence germane to the issue of entrapment, and we submit that the Government's testimony provided no evidentiary foundation for that assertion.

Officer Bush testified that while acting as an undercover agent he became acquainted with the appellant (Tr. 39). Sometime in the middle of July, 1962, the appellant approached the officer and asked him if he wished to purchase some narcotics (Tr. 41). Since the officer only knew appellant casually he indicated to the appellant that he wanted to establish his reliability as a peddler by signalling to a group of narcotic users across the street.[5] Observing the signal, appellant walked away from the officer (Tr. 41). On August 23, 1962, appellant again approached the officer and asked him if he was interested in purchasing some narcotics (Tr. 21). Bush told appellant that he was not interested at that moment but that he would see appellant later (Tr. 21). In the early evening hours of August 23, 1962, Bush again observed appellant who was accompanied by the co-defendant Toney and an unknown female (Tr. 22). At that time Officer Bush followed appellant into an alley and purchased five capsules (Tr. 24-25) that were later identified as containing heroin hydrochloride (Tr. 29, 174).

---

[5]Drug peddlers occasionally sell capsules that do not contain heroin to an unwitting purchaser. (Tr. 41)

Appellant claims that these facts are sufficient to warrant an instruction on entrapment, relying upon this Court's decision in *Johnson* v. *United States*, 115 U.S. App. D.C. 63, 317 F.2d 127 (1963). In the instant case there was no use of an intermediary, no delay until the seller obtained his supply, no transportation of appellant in a Government vehicle to his source of supply, and no offer of narcotics as a reward for the sale. Compare *Johnson* v. *United States, supra.* Indeed, the offer came from appellant and not from the officer (Tr. 21). Appellant, in addition to being ready, willing and able to sell narcotics was actively in the market soliciting business. The record is devoid of any evidence that indicates appellant was persuaded, importuned or coerced into making the sale. "It is difficult to conjure up more complete evidence of [an] open and direct [sale] than we have here." *Berry* v. *United States*, —— U.S. App. D.C. ——, 324 F.2d 407 (1963). The instant case is even more compelling than *Berry* to justify the trial court's refusal to submit the question of entrapment to the jury. The activity objected to by the minority opinion in *Berry*, viz. the use of an intermediary, the assurance given to the seller that the Government agent was reliable, the fact that the seller was sought out by the undercover agent, and the payment of the intermediary by the Government for services, are not found herein. In every case cited by appellant to support his position the court could point to some evidence, introduced by the Government or the defense, in addition to the purchase by the Government agent.[6] We respectfully submit that *Berry* is com-

---

[6] See e.g., *United States* v. *Sawyer*, 210 F.2d 169 (3d Cir. 1954) (Defendant told agent that he had a job and did not sell heroin. The agent told him that he was very sick); *Lutfy* v. *United States*, 198 F.2d 760 (9th Cir. 1952) (Agent pleaded with a reluctant defendant to obtain heroin); *Wall* v. *United States*, 65 F.2d 993 (5th Cir. 1933) (Government employee who was a former mistress of defendant claimed that she was sick and needed narcotics).

pletely dispositive of the instant case.[7] Unless there is substantial evidence from which the jury might reasonably conclude that a defendant's behavior was the "product of the creative activity of Government officials," [8] an instruction on the defense of entrapment is not appropriate.

III. The Harrison Narcotic Act is constitutional

Appellant contends that the Harrison Narcotic Act, 26 U.S.C. §§ 4704(a), 4705(a), is unconstitutional as it applies to heroin because it can no longer be upheld as a valid revenue statute.

The predicate for this argument is the enactment of the Narcotics Control Act of 1956, 70 Stat. 572, 18 U.S.C. § 1402. As appellant reads the Act, heroin for the first time was declared to be contraband thereby precluding any lawful acquisition of this opium derivative. Appellee submits that this argument fails on two grounds.

A. *The Narcotics Control Act of 1956, 18 U.S.C. § 1402, did not prohibit all lawful possession of heroin.*

Appellee suggests that while the Narcotics Control Act of 1956 (18 U.S.C. § 1402) did call for the surrender of the small quantity of legitimately possessed heroin *then* existent and the seizure of the same as contraband if not surrendered, it does not preclude the possession or acquisition of heroin through legitimate channels for scientific research purposes.[9] A close reading of the Act, from a

---

[7] See also, *Lopez* v. *United States*, 373 U.S. 427 (1963); *Fletcher* v. *United States*, 111 U.S. App. D.C. 192, 295 F.2d 179 (1961), *cert. denied*, 368 U.S. 993 (1962); *United States* v. *Sherman*, 200 F.2d 880 (2d Cir. 1952).

[8] *Sorrells* v. *United States*, 287 U.S. 435 (1932).

[9] This view is in accord with that expressed by the Secretary of the Treasury who promulgated the following regulation pursuant to 18 U.S.C. § 1402:

21 C.F.R. § 306.5 *Heroin for scientific research purposes.* Any heroin acquired under the provisions of sec-

practical standpoint, appears to change the possible existence of stamped packages of heroin very little. This view was expressed in the well-reasoned opinion in *Contrades* v. *United States*, 196 F.Supp. 803 (D.C. Haw. 1961), wherein the court stated: "I am impelled to hold that section 1402 does not, by itself, render mere possession of all heroin thereafter illegal." Id a 809. Nothing in the language of the section or the legislative history [10] suggests a different conclusion.

Under 21 U.S.C. § 173, for the years prior to and subsequent to the enactment of 18 U.S.C. 1402, no manufactured product of opium could be imported legally, only such quantities of crude opium as the Federal Narcotics Control Board (5 U.S.C. 2826) deemed necessary for medical or legitimate needs, could be imported. This is true at present. Under 21 U.S.C. § 173, no crude opium may be imported for the purposes of manufacturing heroin. The Opium Poppy Control Act of 1942 (21 U.S.C. 188-188n), prohibits the growth of opium poppies in this country except under license from the Secretary of the Treasury. Furthermore, Section 188c prohibits the manufacture of opium or opium products without a license from the Secretary of the Treasury. Hence, except for the fact that heroin possessed by those people who obtained it prior to the enactment of the above statutes, was seized or surrendered pursuant to 18 U.S.C. 1402, the status of heroin was not changed by the 1956 Narcotics Control Act. Nothing in the statute as it presently exists appears to preclude a doctor from legally prescribing heroin if for legitimate medical needs.

---

tion 1402 of title 18 of the United States Code, shall be available, in the discretion of the Commissioner of Narcotics, for scientific research purposes in accordance with the provisions of section 4733 of the Internal Revenue Code of 1954.

[10] H. Report No. 2388, 1956 U.S. Code Cong. and Admin. News. pp. 3274 *et seq.*

B. *The Harrison Narcotic Act is a constitutional revenue statute.*

Assuming, *arguendo*, that 18 U.S.C. 1402 effectively precluded lawful possession of heroin, the validity of Congress' power to tax the purchase and transfer of heroin would not be affected thereby. That Congress can tax, under its revenue powers,[11] illicit items or illicit activity is no longer open to serious question. *United States* v. *Sanchez*, 340 U.S. 42 (1950); *Yee Hem* v. *United States*, 268 U.S. 178 (1925); *License Tax Cases*, 72 U.S. (5 Wall) 462 (1866). In an analogous situation, the tax on liquor, possession of which was prohibited by the 18th Amendment, was upheld by the Supreme Court in *United States* v. *Yuginovich*, 256 U.S. 450, 462 (1921), wherein the court stated:

> That Congress may under its broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment. *License Tax Cases*, 5 Wall 462, 471; *In re Kollack*, 165 U.S. 526, 536; *United States* v. *Jin Fuey Moy*, 241 U.S. 394; *United States* v. *Doremus*, 249 U.S. 86.

See also *Johnson* v. *United States*, 276 F.2d 84 (4th Cir. 1960)

The Harrison Narcotics Act, 38 Stat. 785, was originally enacted in 1914, two years after the United States became a signatory of the International Opium Convention.[12] Five years after the Act was passed the Supreme Court upheld the constitutionality of Section 2 of the Act[13] as a valid revenue statute. *United States* v. *Dore-*

---

[11] U.S. Const. Act. I. § 8.

[12] 38 Stat. 1912 (1912).

[13] Predecessor of 26 U.S.C. 4705(a).

mus, 249 U.S. 86 (1919). Section I of the Act[14] was upheld in *Alston* v. *United States*, 274 U.S. 289 (1927). See also *Nigro* v. *United States*, 276 U.S. 332 (1928).

Since its original enactment the Supreme Court and the lower federal courts have held the Act constitutional. *Cf. United States* v. *Kahriger*, 345 U.S. 22 (1953); *Beland* v. *United States*, 100 F.2d 289 (5th Cir. 1938), *cert. denied*, 306 U.S. 636; *Mauk* v. *United States*, 88 F. 2d 557 (9th Cir. 1937), *cert. denied*, 302 U.S. 684; *Fyke* v. *United States*, 254 Fed. 225 (5th Cir. 1918). Appellant's assertion that the Act is only a purported revenue measure that is not directed towards the collection of taxes, ignores a basic consideration in finding constitutional validity. It is not the dollar value of the taxes collected that determines the validity of the enactment, but rather the authority of Congress to impose the tax. *Sozinsky* v. *United States*, 300 U.S. 506 (1936). That the revenue is negligible reflects the desired result of the tax.[15] *Sanchez* v. *United States*, *supra*. If the statute operates as a tax, it is within the national taxing power, *Sozinsky* v. *United States*, *supra*.

Similarly it may be regarded as axiomatic that a tax otherwise lawfully levied, does not become unconstitutional because it is destructive. "The power to tax involves the power to destroy." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431; *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869).

Although the most obvious purpose and effect of an excise tax is to raise revenue, it is well established that this is not its only legitimate purpose and effect. The legislature may properly use its powers of taxation not merely to raise funds but also to accomplish incidental regulatory results. The Supreme Court has placed its imprimatur upon the doctrine that taxation need not be only for revenue, recognizing that social and economic results often attend the raising of revenue.

---

[14] Predecessor of 26 U.S.C. 4704(a).

[15] *McCray* v. *United States*, 195 U.S. 27 (1904).

> It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult. As is well known, the constitutional restraints on taxing are few. *United States* v. *Kahriger, supra* at 28.

And in *Veazie Bank* v. *Fenno, supra*, the court upheld congressional use of a tax that was in effect destructive. See also, *McCray* v. *United States, supra.*

More recently the court has stated:

> [I]t has long been established that an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *United States* v. *Sozinsky, supra,* at 513.

The Harrison Narcotic Act was upheld in *Doremus,* even though the revenue obtained was minimal. The dissenting justices in the five to four decision were of the opinion that Congress was exerting a power more properly left to the States. Notwithstanding the strong minority view, when the court was again confronted with the constitutional question in 1928, it did not change its position that the Act was a valid tax statute. *Nigro* v. *United States, supra,* in which Chief Justice Taft quoted at length from *Doremus.* Since the decision in *Nigro,* the Supreme Court has never expressed doubt of the constitutionality of the Harrison Narcotic Act.

The Child Labor Case,[16] cited by appellant is factually distinguishable. There the court found that the tax imposed was in fact a penalty rather a tax. The amount of the tax did not vary with the quantity of the thing taxed, and the tax only applied to "knowing" or "willful" conduct. The emphasis upon "*scienter*" made the act more closely resemble a criminal statute. It is thus manifest that the amount of the revenue collected is not deter-

---

[16] *Bailey* v. *Drexel Furniture Co.,* 259 U.S. 20 (1922).

minative of the constitutionality of the Harrison Narcotic Act if Congress can validly exercise its taxing powers over narcotics.[17]

Appellant's argument with respect to the legal non-availability of heroin in an original stamped package is equally without merit. The situation as to smoking opium is and has been somewhat analogous to that of heroin, especially if 18 U.S.C. § 1402 prohibits all lawful possession of heroin, as appellant suggests. In *Adelman* v. *United States*, 174 F.2d 283 (9th Cir. 1949), in a proceeding pursuant to 18 U.S.C. 2255, the appellant contended that the indictment referred to "imported smoking opium."

> He [Adelman] argues that since the Jones-Miller Act, 21 U.S.C.A. § 173, makes it unlawful to import smoking opium and requires such opium to be summarily seized and destroyed when found, therefore when the Harrison Narcotic Act simply prohibits and makes unlawful the sale of opium "except in the original stamped package", this Act cannot be construed to impose any tax on the imported smoking opium because, being thus prohibited, there would be no such thing as an original stamped package of such opium. *Id.* at 284.

but the court said:

> Congress may tax what it prohibits. (Citing *United States* v. *Yuginovich, supra.*) The manifestation of the intention of Congress to do so here is not lessened by the use of the words "except in the original stamped package." We think the Act clearly imposes the tax on the prohibited product even although stamped packages of such imported smoking opium may never exist. *Id.* at 284.

We submit that even if this Court should find that the Narcotics Control Act of 1956, (18 U.S.C. 1402), effectively prohibited all legal possession of heroin, the con-

---

[17] See *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 393 (1940); *Head Money Cases*, 112 U.S. 580 (1884).

stitutional validity of the Harrison Narcotic Act is not impaired. To hold otherwise would necessarily require a finding that Congress, by enacting 18 U.S.C. 1402, intended to favor traffickers in heroin—a finding that could not be supported by the Act or its legislative history.[18]

Appellant also contends that if he attempted to register pursuant to 26 U.S.C. 4722 he would be required to admit possession of heroin, thereby incriminating himself. Appellant confuses registration of a narcotics supplier and the 'order form' required by Section 4705(a). The form attached to appellant's brief (Appendix A) is the registration form required by Section 4722. This form is submitted to the Secretary of the Treasury by legitimate importers, suppliers and retailers of narcotics. The tax imposed is not a license to do business but rather an occupational tax. Possession of narcotics is not a prerequisite to registering with the Secretary of the Treasury or payment of the tax. The order form mentioned in Section 4705(a) can be obtained from the Secretary of the Treasury. This order form or a doctor's prescription must be given to a registered supplier of narcotics before the supplier can legally dispense the drugs. Clearly possession of narcotics is not a prerequisite to obtaining an order form or a prescription. Since neither form requires possession of narcotics, but are rather the legal means of obtaining narcotics in the future, appellant's contention is frivolous.[19]

Furthermore, appellant's argument challenging the constitutionality of the Harrison Narcotic Act is directed only to the first two counts of the indictment. It is not necessary, therefore, for this Court to consider the merits of his challenge to the Harrison Narcotic Act. Appellant does not attack the constitutionality of 21 U.S.C. § 174, and the sentence on each count in concurrent. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

---

[18] See note 10, *supra*.

[19] *Cf. Sipes* v. *United States*, 321 F.2d 174 (8th Cir. 1963) *cert. denied*, 375 U.S. 913.

IV. Appellant was properly sentenced as a second offender.

Following appellant's conviction the United States Attorney's Office filed an information with the District Court to the effect that appellant had been previously convicted for a violation of the Harrison Narcotics Act (Criminal Case No. 527-55). On June 29, 1955, appellant was committed to the custody of the Attorney General pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5010 (b). The Assistant United States Attorney advised the trial court that appellant had violated his parole status and that no certificate pursuant to 18 U.S.C. § 5021 had been issued setting aside the conviction. Until a certificate has been issued to a youthful offender expunging his criminal conviction, the former conviction must stand. Appellant does not controvert the fact that he was previously convicted for a violation of the Harrison Narcotic Act or that the conviction has not been set aside pursuant to 18 U.S.C. 5021. He predicated his argument upon an interpretation of the definition of "second offender" found in 26 U.S.C. § 7237(c) (1) that we submit is erroneous.

Section 7237(c) (1) provides in pertinent part: ". . . an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in. . ." As appellant reads the definition it is the imposition of the penalty provided in this section that is determinative of whether he should be considered a second offender. We believe that the statute defines a "second offender" as one who had previously been convicted of an offense that is made punishable by Section 7237(a) or (b).[20] Grammatically, the clause—'the penalty for which was provided in subsection (a) or (b)' is a restrictive adjective clause qualifying 'offense'. Reference to subsection (c) (2) of

[20] *Cf. United States* v. *Toy*, 273 F.2d 625 (2d Cir. 1960).

Section 7237 supports this conclusion, wherein it is provided that: "If it is not a first offense, the United States Attorney shall file an information setting forth the *prior convictions*" (emphasis added). If appellant had received a certificate, pursuant to 18 U.S.C. § 5021, setting his prior conviction aside he could have been sentenced as a first offender. In the absence of a certificate setting aside his prior conviction, appellant was properly sentenced as a second offender.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
ALAN KAY,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 727187 841